

CIVIL REVISION APPLICATION No 603 of 1997

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

2. To be referred to the Reporter or not? No @@

5. Whether it is to be circulated to the Civil Judge?
No

VISHWANATH POPATLAL DAVE

MR DK NAKRANI for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 21/12/98

ORAL JUDGEMENT

1. Brief facts giving rise to this revision are as under :

2. Civil Suit No.41 of 1986 was filed by the respondent against the revisionist for eviction under the Bombay Rent Act, 1947. The Suit was pending. Defendant expired on 15.8.1996. Since nobody appeared from the side of the defendant nor his Counsel, hence ex parte decree was passed on 6.9.1996. As against this ex-parte decree the revisionist, being legal representatives of the deceased defendant, filed an Appeal. The said Appeal was barred by time by 73 days. An application under Section 5 of the Limitation Act was moved for getting this delay condoned. The Appellate Court rejected the said Application for condonation of delay. Hence, this Revision.

3. Having heard the learned Counsel for the parties and examining the order under Revision it appears that the defendant was seriously ill some times since before 15.8.1996, and on this date his condition deteriorated. He was admitted in Hospital on 15.8.1996 and he expired on the same date. The defendants are the legal representatives of the deceased defendant. The advocate of the defendant sent two notices to the defendant, one by Registered A.D. post and another under Certificate of posting showing his intention to withdraw from the case as the defendant was not appearing to instruct him. Notice sent by the Advocate by Registered Post was not served. Presumption was drawn that the notice sent under Postal Certificate was served. The trial Court was not still satisfied hence it sent two notices at the changed addresses of the defendant. First Notice was returned unserved. The second notice was served on the son of the defendant. On the basis of this service, which was considered to be sufficient service, the trial Court proceeded to decide the case and passed ex-parte decree on 6.9.1996. Son of defendant had no knowledge of the proceedings and the ex-parte decree. He came to know of the ex-parte decree on 18.12.1996. Copies were applied for, which were received on 2.1.1997 and thereafter Appeal was filed.

4. For getting the delay condoned medical certificates were filed showing illness of the deceased

defendant and also death Certificate of deceased defendant. These reasons were not found to be sufficient by the Appellate Court. The view taken by the Appellate Court is patently contrary to law and the direction from the Apex Court from time to time that matter of condonation of delay should be taken liberally. It appears from the judgment of the lower Appellate Court that the Advocate of the plaintiff did not appear to contest this application for condonation of delay, still without any counter Affidavit and without medical Certificate being controverted the Appellate Court took the view that the ground for condonation of delay was not sufficient. The Appellate Court also over-looked a material fact that the defendant expired on 15.8.1996 whereas the ex-parte decree was passed on 6.9.1996. It was thus a decree which was prima facie nullity inasmuch as it was passed against a dead person. This is a point which requires consideration in Appeal and rejection of Appeal on grounds of limitation has done substantial injustice to the appellant, more particularly when the application for condonation of delay was not contested from the side of the plaintiff decree holder.

5. The cause shown in the application for condonation of delay is sufficient. The Lower Appellate Court has thus committed manifest illegality in rejecting the application. The Revision, therefore, succeeds and is hereby allowed. The impugned order dated 29.3.1998 is set aside. The delay in filing the Appeal is condoned. The Appellate Court shall admit the Appeal to its number and shall decide the same within a period of three months from the date of production of certified copy of this order. No order as to cost.

sd/-

(D. C. Srivastava, J.)

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